CASE NO. DA 10-0174

IN THE SUPREME COURT OF THE STATE OF MONTANA

* * * * * * * * * * * * * * * * *

ROBERT F. EHRMAN

Plaintiff/Appellant,

v.

KAUFMAN, VIDAL, HILEMAN
& RAMLOW, PC

Defendant/Appellee.

* * * * * * * * * * * * * * * * *

On Appeal from the Eleventh Judicial District Court
Flathead County, State of Montana
Cause No. DV-08-475C

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APPELLANT'S BRIEF

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APPEARANCES:

Floyd D. Corder, Esq.
CORDER LAW PLLC
410 Central Ave., Suite 506
P. O. Box 2886
Great Falls, MT 59403

Attorney for Plaintiff/Appellant

Mikel L. Moore, Esq.
CHRISTENSEN, MOORE, COCKRELL
CUMMINGS & AXELBERG, PC
P. O. Box 7370
Kalispell, MT 59904-0370

Attorney for Defendant/Appellee

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I. STATEMENT OF ISSUES

WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT ROBERT F. EHRMAN'S ("EHRMAN") CLAIM OF LEGAL MALPRACTICE WAS BARRED BY THE THREE YEAR STATUTE OF LIMITATIONS FOR LEGAL MALPRACTICE ACTIONS.

II. STATEMENT OF CASE

On April 17, 2008, Ehrman brought an action to recover damages sustained by him as a result of the negligence of the law firm of Kaufman, Vidal, Hileman & Ramlow, P.C. ("KVHR"). KVHR moved for summary judgment on the grounds of statute of limitations. On March 5, 2010 the District Court entered an Order and Rationale on Motion for Summary Judgment (Exhibit A), ruling that Ehrman's claim was time barred under the three year statute of limitations. The District Court entered a Final Judgment on March 17, 2010 (Exhibit B). Ehrman timely appealed from the Final Judgment.

III. STATEMENT OF FACTS

The District Court properly notes that this case arose out of an agreement between Ehrman and William Baillie ("Baillie") for an easement and lease of a boat dock on Flathead Lake at Bigfork, Montana. Baillie proposed to transfer to Ehrman the rights he reserved in a Contract for Deed executed when he sold the property on Bigfork Harbor.

Ehrman came to KVHR in January, 2002, with a specific concern and sought legal advice regarding his concern. His concern was that the Contract for Deed had language in it that provided:

> The Buyer agrees to provide Sellers and Sellers' heirs with a boat dock – either the currently existing dock or a reconstructed dock – and shall likewise provide Sellers and Sellers' heirs with walking access for ingress and egress to and from the aforementioned dock.

Ehrman was not an heir of William Baillie and requested advice as to whether he could acquire from Baillie his rights under the Contract for Deed. KVHR assured him he could and drafted a document entitled "Lease and Agreement for Assignment of Easement to Boat Dock." Ehrman and Baillie signed the Lease and Agreement and dated it June 5, 2002. Ehrman used the dock pursuant to the Lease and Agreement until August, 2007. It is Ehrman's contention that KVHR committed negligence when it gave him advice and drafted the document and that the negligence was continuing and ongoing as KVHR continued to assure and advise Ehrman that he had the right to lease and acquire the dock rights.

The undisputed facts are that Ehrman had a legal question upon which he needed legal advice.

> Q Did you give Mr. Ramlow specific direction for what it is you wanted him to accomplish?
>
> A I just wanted to know if it was assignable, if we could – if it's something that we could purchase.

Depo. of Robert Ehrman, p. 16, ll. 16-21.

James Ramlow provided Ehrman legal advice:

Q Okay. At some point your recollection is that Mr. Ramlow made a statement to you about the ability of Mr. Baillie to assign?

A Oh, yes.

Q What did he tell you?

A He told me that there would be no reason that they could – He asked me if I had any felonies or anything or anything in my past that would give them reason not to assign to me, and I said, No, I didn't. Of course not.

He said, Well, fine. We'll have no problem.

Q Do you remember whether those statements were made before or after you signed the lease and agreement to assign?

A Before. All of that was done before.

Ehrman Depo., p. 23, ll. 5-20.

Ehrman relied on the legal advice.

Q Did that cause you to wonder whether Mr. Myers would consent to an assignment to you when, in fact, he wanted the property himself?

A No.

Q You weren't concerned about that?

A No, because I had counsel that told me I didn't have to be concerned about it.

Q And, again, the basis for being told you didn't have to be concerned was?

A Jim Ramlow kept saying, You have the right. When they did deny it, he kept saying, They didn't read back far enough. He said, They just didn't read it far enough. If they'd read it, they'd know that they have the right to assign it to you.

Q When they say they didn't read it back far enough, they're referring to the contract between --

A The contract between Baillie and Lincoln.

Ehrman Depo., p. 33, l. 16 through p. 34, l. 9.

The parties to whom Baillie sold the Bigfork Harbor property objected to Baillie's transfer of his reserved rights in the dock and ultimately brought a lawsuit to declare Baillie's transfer invalid. During the pendency of the lawsuit, Ehrman had access to the boat dock and kept his boat there. District Court Judge Ted O. Lympus, on August 1, 2007, entered an order in the lawsuit and held "[t]he dock easement was reserved by the clear language of the Contract for Deed, providing that the easement was only for the benefit of the seller and his heirs" (Exhibit C). Judge Lympus determined that the document drafted by KVHR was null and void. It was at this time, August, 2007, that Ehrman had to give up his interest in the boat dock, remove his boat, and was subject to damages for the use of the boat dock from June, 2002 to August, 2007.

Before summary judgment was granted by Judge Lympus in August of 2007, Ehrman was not aware of KVHR's professional negligence because he was continually being reassured that the legal advice was correct:

Q So you didn't give serious consideration to entering into a new lease?

A Not at all. Through my attorney's consult. He said, No. We'll defend this, and we did. We went after it.

All I ever did was listen to my attorneys. That's all I ever did. Any time there was any question – I'm smart – I am not too smart but I'm smart enough to know I don't know the law, so I get the best counsel I can and listen to what they have to say.

Q Did your attorneys, whether it was Jim Ramlow or Karl Rudbach, say that you were guaranteed to prevail on your position?

A Jim always said that they just didn't read far enough. Absolutely. He said, There's no question about this. If they read far enough, they'll see.

There was never any question in my mind until the day that we lost the summary judgment that we weren't going to win that thing. I was assured by them that they just hadn't read far enough. Karl wasn't as positive as Jim, but Jim was positive the whole time. He kept saying, They're just not reading back far enough. When I'd call and talk to him, he's say, No. Don't worry about it; They're just not reading far enough.

Ehrman Depo., p. 51, l. 8 through p. 2, l. 10.

It seems obvious that KVHR failed to review and legally analyze the underlying Contract for Deed even though that is what Ehrman requested of them. KVHR negligently drafted a document and advised Ehrman to sign the document and then continually assured Ehrman that their advice was correct. KVHR never once advised Ehrman of any risks involved with the transaction. Ehrman had

retained an expert who would have opined at trial that KVHR's actions constituted professional negligence.

IV. STANDARD OF REVIEW

Review of a summary judgment order is de novo. *Johnson v. Barrett*, 1999 MT 176, ¶9, 295 Mont. 254, ¶9, 983 P.2d 925, ¶9. Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. The Court reviews summary judgment rulings utilizing the same Rule 56, M.R.Civ.P., criteria applied by the District Court. *Johnson*, ¶9. The movant must demonstrate both the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *MacKay v. State of Montana*, 2003 MT 274, ¶14, 317 Mont. 467, ¶14, 79 P.3d 236, ¶14. Any factual inferences which can be drawn must be resolved in favor of the non-moving party. *Morton v. M-W-M, Inc.*, 1994, 263 Mont. 245, 249, 868 P.2d 576, 579.

V. SUMMARY OF THE ARGUMENT

The three year statute of limitations for legal malpractice actions is governed by the "discovery rule" and the "accrual rule". Under both rules, Ehrman timely filed his complaint against KVHR. Ehrman's malpractice claim is not barred under the "discovery rule" because he justifiably relied on KVHR as his attorneys and the fiduciary relationship that existed excused earlier discovery of KVHR's negligence. Ehrman's malpractice claim is not barred under the "accrual rule" as

he did not suffer actual injury until August of 2007. Therefore, his claim did not accrue until then. The District Court erred in granting KVHR's motion for summary judgment and its decision should be reversed and this case should be remanded for a jury trial.

VI. ARGUMENT

The statute of limitations for a legal malpractice action provides:

> An action against an attorney licensed to practice law in Montana or a paralegal, assistant or a legal intern employed by an attorney based upon the person's alleged professional negligent act or for an error or omission in the person's practice must be commenced within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the act, error, or omission, whichever occurs last, but in no case may the action be commenced after 10 years from the date of the act, error or omission.

Section 27-2-206, MCA.

In all cases, the first issue to address, when determining whether a party is barred by the statute of limitations, is when the statute begins to run. In the context of legal malpractice actions, this Court has held that both the "discovery rule" and the "accrual rule" are statutorily binding. *Johnson*, ¶¶11-20 (confirming statutory adoption of "discovery rule"); *Uhler v. Doak* (1994), 268 Mont. 191, 195-200, 885 P.2d 1297, 1300-03 (confirming statutory adoption of "accrual rule").

This Court has clearly stated the meaning and parameters of these rules.

> The 'discovery rule' begins the statute of limitations upon the discovery of the negligent act. Section 27-2-206, MCA; *Johnson*, ¶11-20. The 'accrual rule' provides that the statute of limitations begins when all elements of a claim, including damages, have occurred. *Uhler*, 268 Mont. at 195-200, 885 P.2d at 1300-03 (adopting 'accrual rule' pursuant to §§27-2-102(1)(a) and (2), MCA). Thus, the law in Montana for legal malpractice actions is that the statute of limitations does not begin to run until both the 'discovery rule' and the 'accrual rule' have been satisfied. Hence, the statute of limitations in a legal malpractice action does not begin to run until the negligent act was, or should have been, discovered, and all elements of the legal malpractice claim, including damages, have occurred.

Watkins Trust v. Lacosta, 2004 MT 144, ¶¶39-40, 92 P.3d 620, ¶¶39-40.

In the present case, Ehrman's claims filed on April 17, 2008 were timely because: (i) he did not discover, and should not have discovered, the negligent act until August of 2007; and (ii) Ehrman did not incur damages, thus his claim did not accrue until 2007. Therefore, the District Court erred in its ruling that Ehrman's legal malpractice claims were time barred.

A. EHRMAN'S LEGAL MALPRACTICE CLAIM IS NOT BARRED BY THE DISCOVERY RULE.

In *Watkins Trust v. Lacosta*, this Court recognized that where a confidential relationship exists, such as Ehrman had with KVHR, the failure to discover facts constituting a claim, may be excused and the statute of limitations may be tolled. *Watkins Trust v. Lacosta*, ¶19 (citing *Shiplet v. First Sec. Bank of Livingston* (1988), 234 Mont. 166, 174, 762 P.2d 242, 247, overruled on other grounds by *Secco v. High Country Indep. Press* (1995), 271 Mont. 209, 896 P.2d 411).

It is worth noting, as this Court did, the United States Supreme Court's statement:

> There are few of the business relations of life involving a higher trust and confidence than that of attorney and client . . . and it is a duty of the court . . . to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the party bestowing it.

Stockton v. Ford (1851), 52 U.S. 232, 247, 11 How. 232, 13 L.Ed 676 (cited in *Watkins Trust v. Lacosta* ¶19).

In the instant case, Ehrman relied on his attorney. The District Court, in its Order and Rationale on Motion for Summary Judgment, focuses on when Ehrman knew that he would have problems getting a written consent to his assignment. That is not the issue because Ehrman was repeatedly told that that consent could not be withheld and he had a right to continue to lease the dock and could eventually acquire the dock rights. It must be noted that Ehrman went to his attorneys because he had questions as to whether the rights could be assigned. The only way for Ehrman to know that the advice he got, and he was getting, from his attorneys was wrong, was for him to hire another attorney. If this Court affirms the District Court, it would be in essence telling clients that their reliance on their attorney's advice without a second opinion could lead to their detriment and prevent them from ever making a claim against their attorney. Just as in the *Watkins Trust v. Lacosta* case, the only mistake Ehrman made was relying upon his

attorney. Ehrman was entitled to trust his attorney as his fiduciary. The District Court erred in holding that Ehrman's claims were time barred.

At a minimum, there are factual issues as to when Ehrman should have discovered the malpractice. When a statute of limitations issue involving a legal malpractice claim relates to actual discovery, the test is knowledge of the facts essential to the malpractice claim, rather than discovery of legal theories. *Johnson*, ¶11. The standard is whether one has information of circumstances sufficient to put a reasonable person on inquiry regarding the act of omission. Id. Ehrman was using the boat dock and was continually being assured by KVHR that he had that right and that Baillie's interests were assignable even though he was not an heir of Baillie. Until Judge Lympus ruled that the document drafted by KVHR was fatally flawed, Ehrman could not reasonably have known of the malpractice of KVHR. The District Court was wrong when it held that,

> There are no disputed questions of fact that Plaintiff Ehrman knew no later than July, 2004 that Bayside Park and Marine, Myers and Lincolns were not going to give written consent to the assignment of dock and access rights.

Order and Rationale on Motion for Summary Judgment, p. 4, ll.10-11. The District Court was wrong because it focused on written consent which KVHR had told Ehrman could not be withheld. Ehrman could have cared less about what Bayside Park and Marine or Myers or Lincolns thought because his attorneys were advising him that they were wrong and could not withhold consent. The District

Court essentially said Ehrman was to listen to the parties rather than his attorneys. That is err and the decision of the District Court should be reversed.

B. EHRMAN'S LEGAL MALPRACTICE CLAIM IS NOT BARRED BY THE ACCRUAL RULE.

This Court has held that the "accrual rule" applies to legal malpractice actions and that the statute of limitations does not begin to run until all elements of a claim, including damages, have occurred. *Uhler*, 268 Mont. at 195-200, 885 P.2d at 1300-03. Specifically, the *Uhler* court stated that,

> [i]n order to establish a cause of action for legal malpractice, there must be a showing that the attorney owed his client a duty of care, that there was a breach of this duty by a failure to use reasonable care and skill, and that the breach was the proximate cause of the client's injury and resulted in damages.

Uhler, 268 Mont. at 196, 885 P.2d at 1300 (citing *Merzlak v. Purcell* (1992), 252 Mont. 527, 529, 830 P.2d 1278, 1279-80).

This Court, in *Watkins Trust v. Lacosta*, explained the rationale behind *Uhler* which included how inherently illogical and unfair it would be for a client to file suit against his/her attorney before any actual damages had been sustained because the suit would properly be dismissed. Further, the mere threat of future harm does not constitute actual damages. *Watkins Trust v. Lacosta*, ¶29.

If you follow the District Court's logic that Ehrman knew or should have known, of his malpractice claim in July of 2004, and that he had three years, or until July of 2007, in which to bring an action for legal malpractice, then Ehrman

would have had to bring his action while he was still in possession of, and using, the dock and still being told by his attorneys that he had a right to the use of the dock under the document the attorneys had drafted. It was not until August of 2007 that that document was declared null and void. If the District Court's decision is affirmed, Ehrman would essentially be told that he had no right to rely on his attorney and to preserve his claim, he had to file a lawsuit prior to incurring or being subject to any damages.

Ehrman was statutorily precluded from bringing suit until he had incurred actual damages. Ehrman's malpractice claim did not accrue until August of 2007. The District Court's decision otherwise is in err and should be reversed.

VII. CONCLUSION

For the reasons set forth above, Ehrman respectfully requests that this Court reverse the ruling of the District Court, and remand this action to the District Court for further proceedings and trial by jury.

DATED this 22nd day of July, 2010.

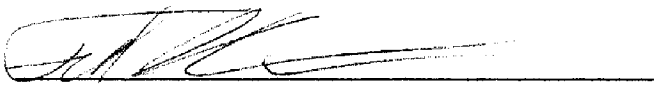
CORDER LAW PLLC

Floyd D. Corder, Esq.
410 Central Avenue, Suite 506
P. O. Box 2886
Great Falls, MT 59403
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2010, the foregoing was duly served upon counsel listed below by depositing a copy in the United States mail at Great Falls, Montana, enclosed in a sealed envelope with first class postage thereon and addressed as follows:

Mikel L. Moore, Esq.
Christensen, Moore, Cockrell,
Cummings & Axelberg, PC
P. O. Box 7370
Kalispell, MT 59904-0370



Floyd D. Corder, Esq.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced, except for quoted and indented material; and the word count calculated by Microsoft Word is not more than 10,000 words, not averaging more than 280 words per page, excluding Certificate of Service and Certificate of Compliance.

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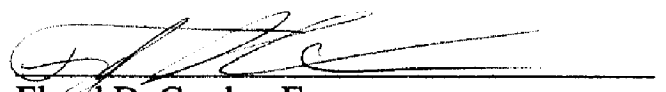

Floyd D. Corder, Esq.